



THE WONDERFUL WORLD OF PRIVILEGE

# CPD Legal Studio Continuing Legal Development

March 2020

## Clayton Utz hands over AMP docs to ASIC, ending legal stoush

### ASIC challenges AMP, Clayton Utz on documents relating to fees-for-no-service scandal

By business reporter [Nassim Khadem](#)

Updated 17 Dec 2016, 5:48pm

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The regulator, the Australian Securities and Investment Commission (ASIC), is seeking records of interviews undertaken with AMP staff in relation



#### Brexit

## Full Brexit legal advice to be published after government loses vote

Historic motion passes by 18 votes to find government in contempt of parliament



## Glencore fails to prevent tax office using Paradise Papers documents

Australia's high court decides legal professional privilege does not apply to use of documents in assessing tax

### ATO cracks down on legal professional privilege 'misuse' after Paradise Papers tax leak

By business reporter [Nassim Khadem](#)

Updated 15 Mar 2019, 8:00am

Tax commissioner Chris Jordan is warning lawyers that the Australian Taxation Office is stepping up its crackdown on tax and legal professionals it suspects may be misusing legal professional privilege.



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### Informer 3838 scandal widens as it emerges up to five other lawyers may have acted as informants



# A refresher on LLP

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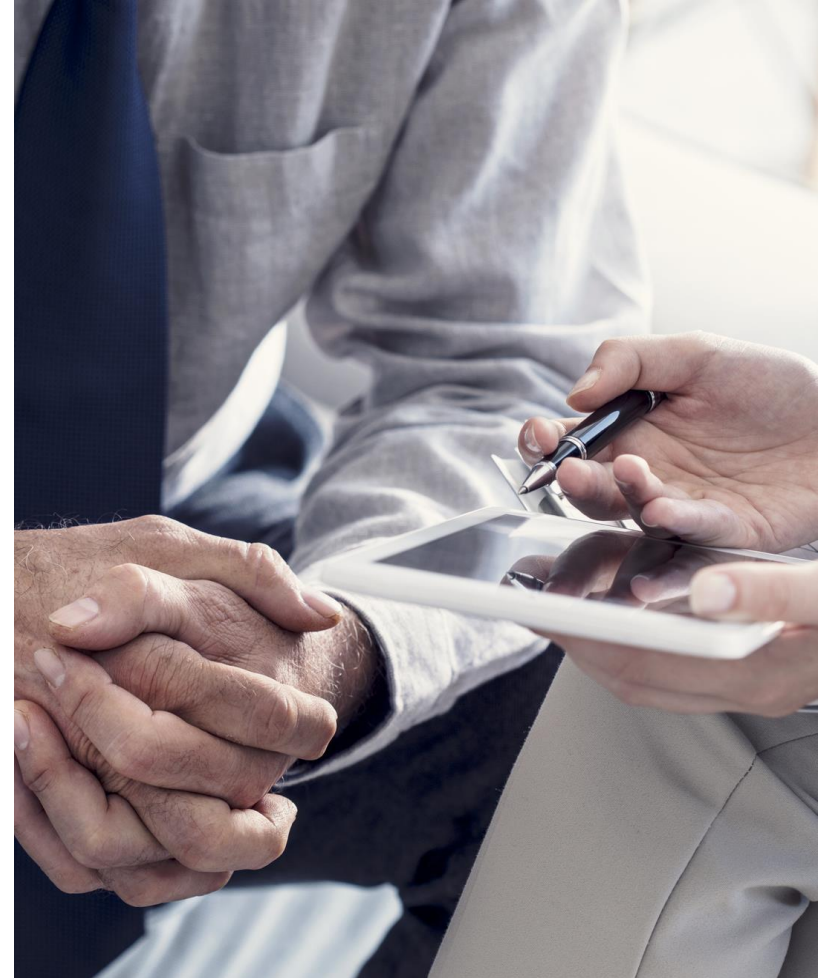
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# Why does it exist?

## A refresher on LLP

- Rule of law giving protection from compulsory disclosure
- Facilitate open and frank communications between a lawyer and his / her client(s)



# When? To all communications?

## A refresher on LLP

LPP does not apply to **all** communications with lawyers. Simply copying lawyers to communications does not provide 'immunity'.

LPP applies to communications where the dominant purpose of the communication is either:

- Giving or obtaining **legal advice**;
- Use in existing or contemplated **litigation**.

Various state and Cth Evidence Acts - if material is sought as evidence in Court.

**Warning: Not all acts are the same!**

Common Law for all other purposes

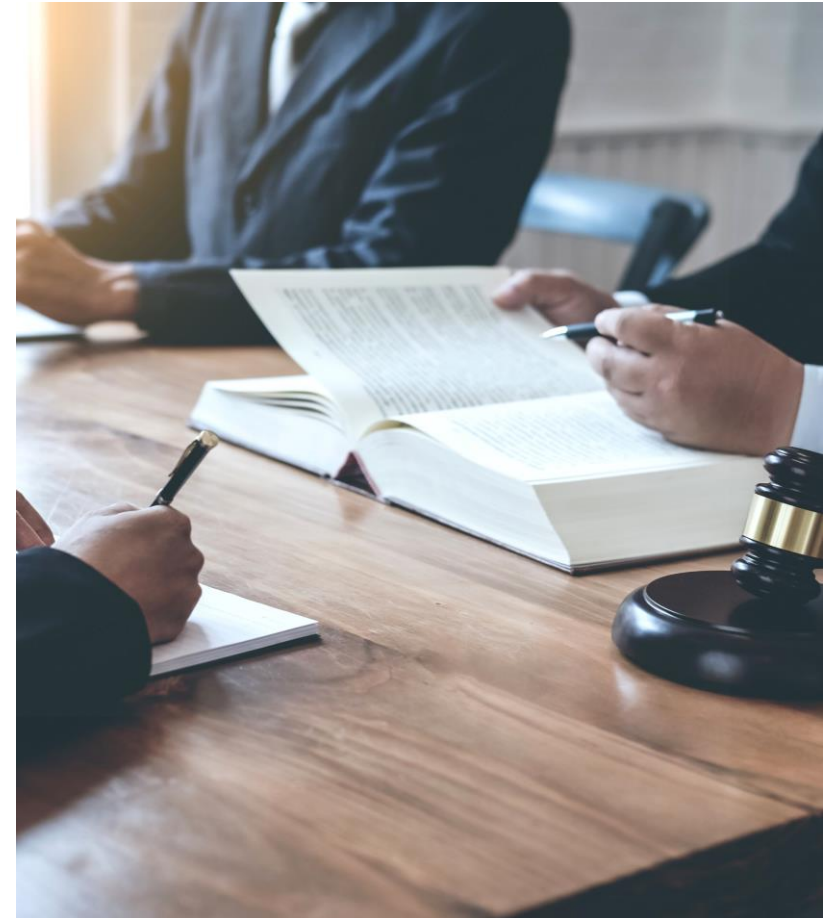


# What is the scope of 'legal advice'?

## A refresher on LLP

The concept is fairly wide.

- Legal advice is not confined to telling the client the law but includes professional legal advice as to what should prudently and sensibly be done in the relevant legal context.
- Legal advice includes professional advice given by lawyers to a client as to what evidence and submissions should be placed before a commission of inquiry.
- LPP may attach to communications with in-house counsel provided they are consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.



# When does litigation privilege arise?

## A refresher on LLP

- When litigation is reasonably anticipated or contemplated.
- There must be a *real prospect* of litigation, as distinct from a mere possibility, but it does not have to be more likely than not.
- Consider setting up legal advice privilege when litigation is still a 'mere possibility'.





# How you get LPP – three critical elements

## A refresher on LLP

### Three critical elements:

- Dominant purpose – provision of legal advice or legal services for litigation
  - Confidential communication or document
  - Independent legal adviser
- Onus is on party claiming LPP to prove it.
  - Purpose for which document created is a question of fact which must be determined objectively.
  - Not established by mere assertion or verbal formula.





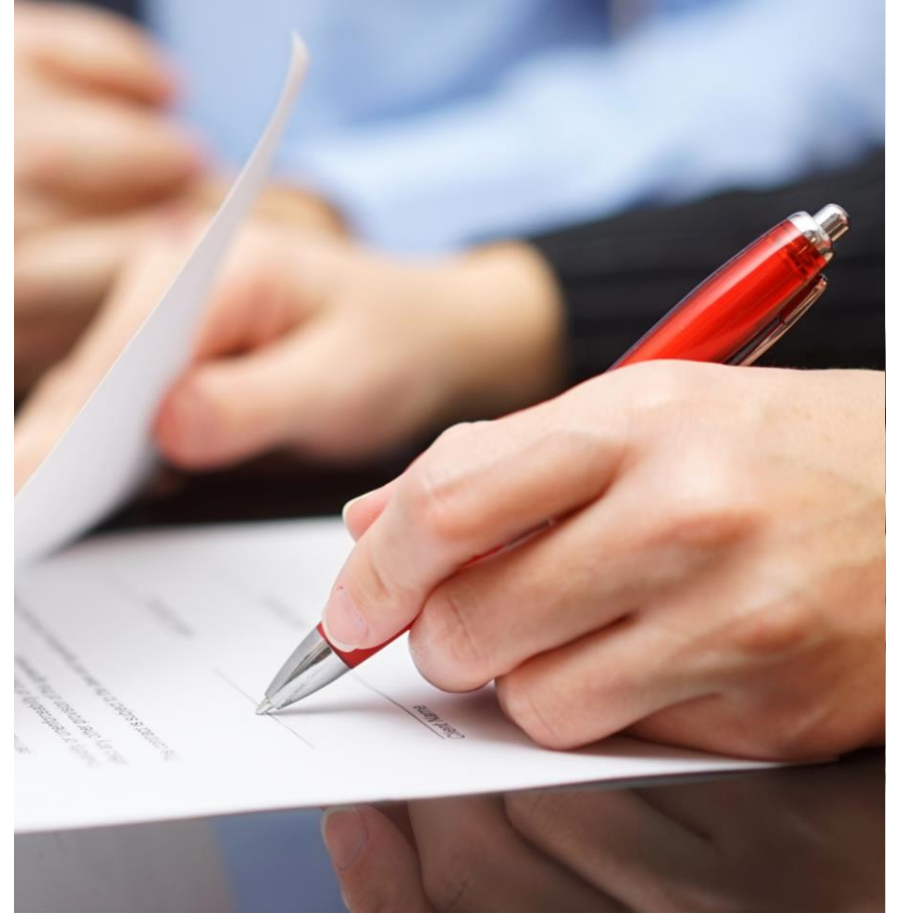
# What is a dominant purpose?

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## A refresher on LLP

The "dominant purpose" brings within the scope of the privilege a document brought into existence for the purpose of a client being provided with professional legal services notwithstanding that some ancillary or subsidiary use of the document was contemplated at the time.

Where there are multiple purposes of equal weight – there is no dominant purpose and no privilege.



# What is the scope of the protection?

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## A refresher on LLP

- Protects disclosure of documents recording legal work carried out by the lawyer – eg research memoranda, collations, summaries, chronologies, whether or not they are actually provided to the client.
- Extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the lawyer to enable them to advise.
- Extends to any document prepared by a lawyer or client from which one might infer the nature of the advice sought or given – including internal documents or parts of documents of the client or the lawyer reproducing or revealing privileged communications.
- Prevents disclosure to other parties, Courts and regulators.



# Redacting privileged communications

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## A refresher on LLP

- When can you redact?
- Waiver by rendering document incomprehensible or meaningless
- Challenging redactions based on LPP







# In-house counsel

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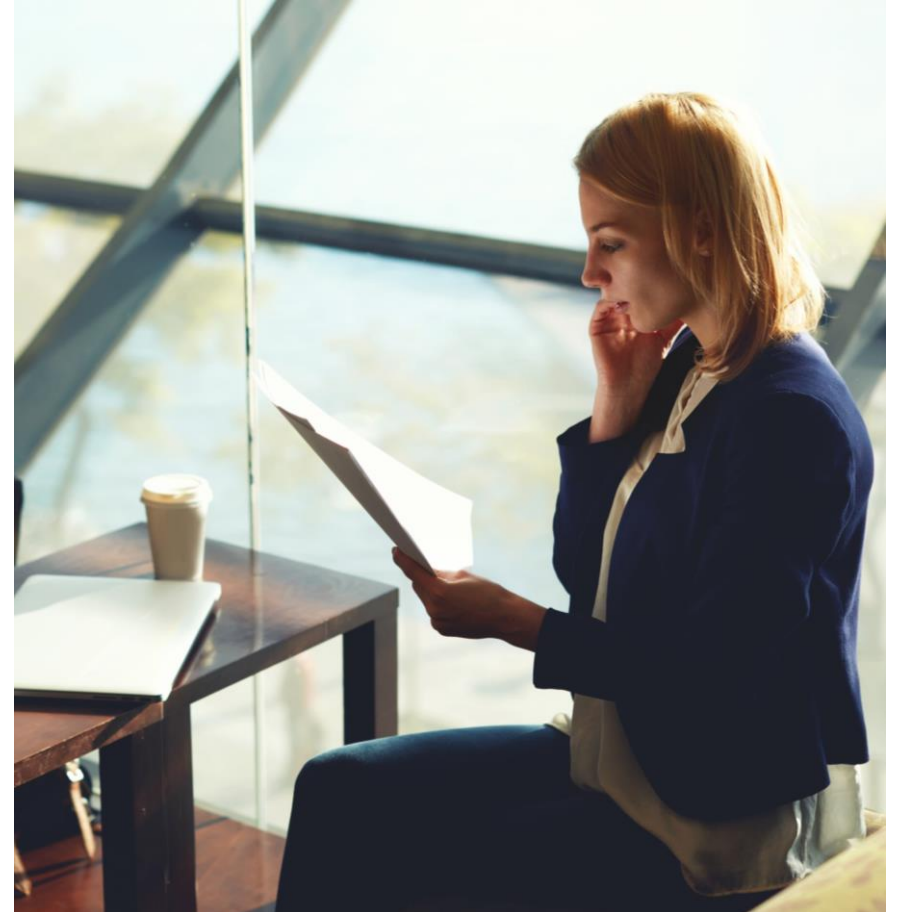
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# Independence of in-house counsel

## In-house counsel

### **In-house counsel will be considered independent if:**

- consulted in a professional capacity
- in relation to a professional matter
- communications are made in confidence
- arise from a lawyer and client relationship – independent of any other capacity
- without any personal loyalties, duties or interests influencing professional legal advice



## Case examples

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[Business](#) [Legal](#) [Legal industry](#)

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# **Archer Capital loses \$200 million court claim against Sage**



# What about internal and external investigations / reports?

## In-house counsel

- Not automatically covered by privilege
- Increased pressure and activity by regulators and commissions of inquiry for access to privileged documents.
- Practical steps

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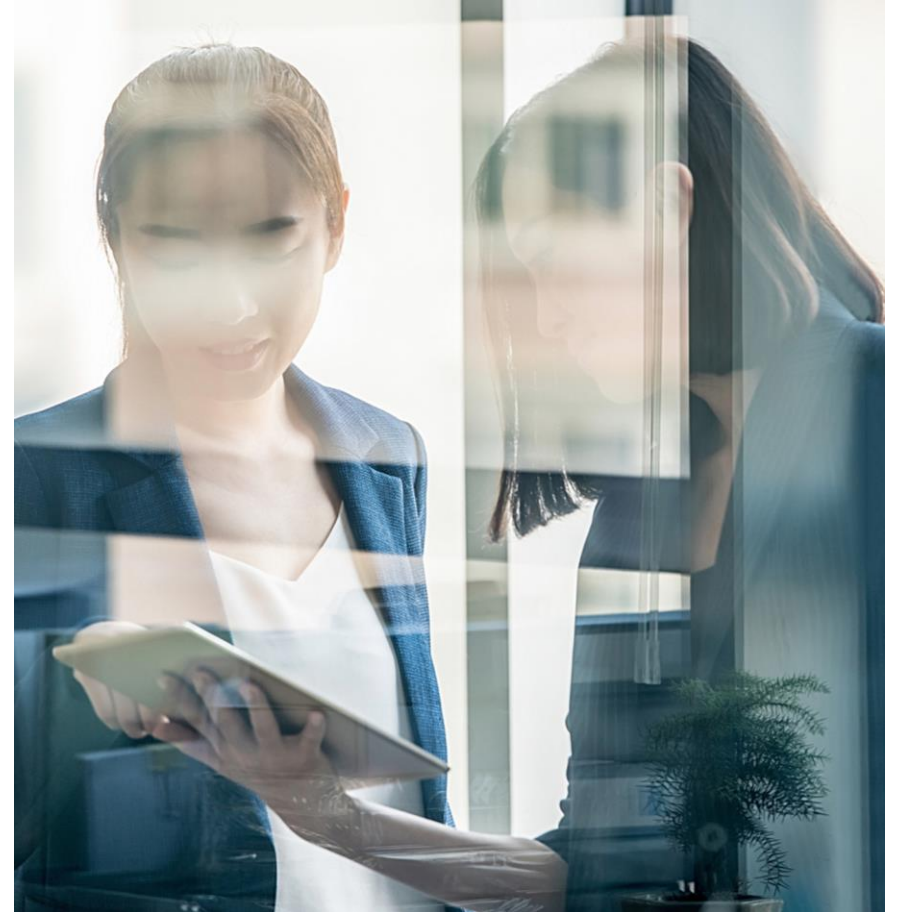
# Practical tips for in-house counsel

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## In-house counsel

### Best practice tips:

- Clearly state the reason for the communication.
- Make a record of the reason for sending any significant communication.
- Obtain written instructions from any internal client before obtaining a third-party report or preparing an internal report.





# Common interest & joint privilege

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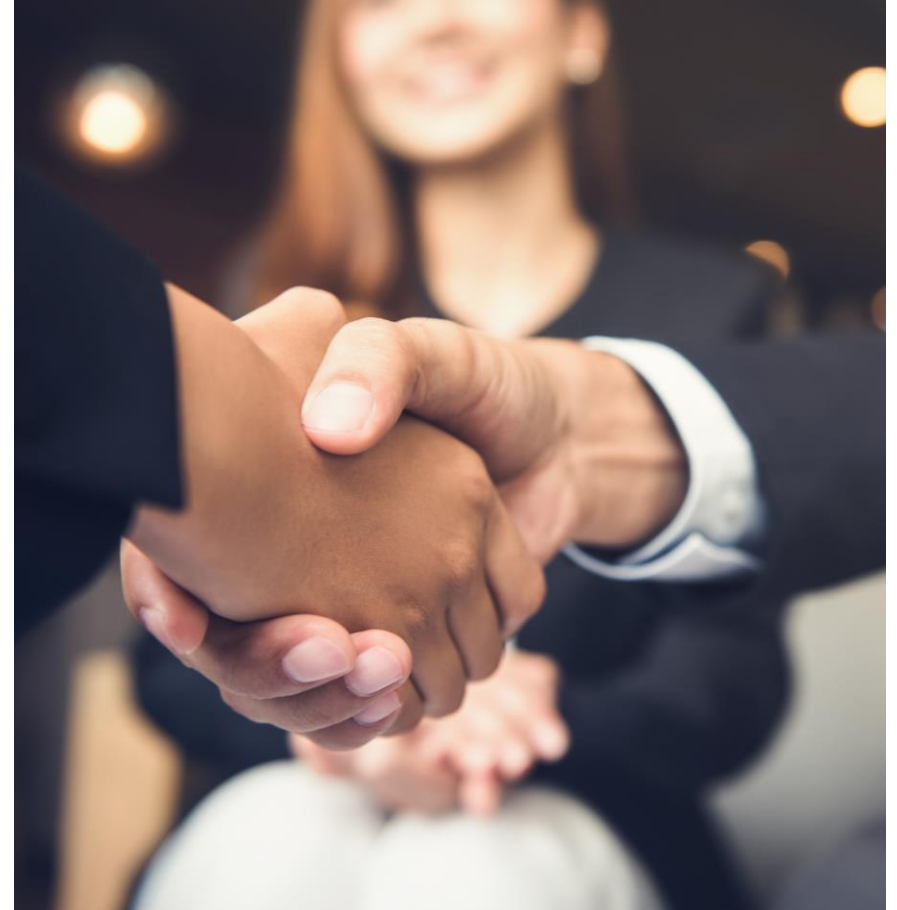


# Common interest privilege

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## Common interest & joint privilege

- Exception to the general rule regarding waiver / loss of privilege.
- Self-same, similar, aligned.
- Not selfish or potentially adverse.
- Ceases if there is a conflict of interest.
- One common interest privilege holder may waive privilege.
- It is not enough for both parties to have an interest in a matter or proceeding to maintain privilege, both or all parties must be seeking the same result.



## Example of common interest privilege: Insured and insurer

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### Common interest & joint privilege

#### ***Marshall v Prescott* [2013] NSWCA 152**

- insured / insurer;
- common interest between insured and insurer; and
- present common interest will not be destroyed by the potential for future divergence of interest;

- 2-step process in finding common interest:
  - whether, by normal standards, the document would be privileged; and
  - whether the relationship between the parties is sufficiently close that transmission of the documents does not amount to implied waiver

# Joint privilege

## Common interest & joint privilege

- Where two or more parties seek advice from one source jointly.
  - Joint privilege holders cannot claim privilege against each other.
  - Any of the joint privilege holders can invoke privilege against a third party.
  - All joint privilege holders must agree to waiver (no unilateral waiver).
- In order to establish individual privilege where there could be an argument for joint privilege, the party bearing the onus needs to establish that there was an individual retainer by them of one or more persons referred to in the relevant document: *Sheahan and Lock (Liquidators) Re Binqid Finances Pty Ltd (In Liq)* (2015) 107 ACSR 163 at 164.



## **Carve outs - waiver of LPP**

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# Carve outs

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- Abrogation by statute
- Crime or fraud
- National security
- Waiver



# Waiver

## Clayton Utz hands over AMP docs to ASIC, ending legal stoush

### Law Offices of Michael Cohen

★ ★ ★ ★ ★ Eek! Methinks not.

If anyone is looking for a good lawyer, I would strongly suggest that you don't retain the services of Michael Cohen! Doesn't believe in sanctity of attorney-client privilege. A total joke!



**Donald J. Trump** ✓  
@realDonaldTrump

Attorney–client privilege is dead!

8:07 AM - 10 Apr 2018

## Tony Mokbel among gangland convictions a due to police use of lawyer as informant

By Ben Knight and Jean Edwards  
Updated 3 Dec 2018, 7:57pm



Follow

# Waiver of LPP

## Carve outs – waiver of LLP

May be express or implied

- Disclosure of the document/information; or
- Disclosure of the gist, conclusion or substance of the document/information.

- Conduct inconsistent with the maintenance of confidentiality that the privilege protects.
- Section 122 of the *Evidence Act*
- Disclosure to another company within group may be a waiver
- Protection against waiver if the disclosure is made under confidentiality and for a limited purpose



## Recent examples of waiver – inadvertent disclosure

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### Carve outs – waiver of LLP

*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303

- In the course of discovery, documents subject to LPP were inadvertently disclosed.
- The law firm disclosing the documents promptly realised the error and wrote to the other party requesting the return of the documents.
- The High Court held that LPP had not been waived given the nature of the disclosing party's conduct.





## Recent examples of waiver – insured and insurer

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### Carve outs – waiver of LLP

#### ***Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)*** **[2014] FCA 796**

- Asahi alleged breaches of warranties in a sale agreement by the sellers.
- Asahi's solicitors had prepared a report setting out the details of the breaches, which was provided to Asahi's insurers.
- Court found Asahi had waived privilege in the report by disclosing it to the insurers.





Privilege – shield, not a sword

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## Implications from *Glencore International v Commissioner of Taxation*

### **Does the law of privilege confer an actionable right to restrain use of privileged materials?**

- Paradise papers included documents relating to a restructure of Glencore. Documents came into the possession of the ATO.
- Glencore sought an order for delivery up of documents in possession of ATO and an injunction restraining use of the documents.
- High Court decided that LPP is only an immunity from the exercise of powers that would otherwise compel the disclosure of privileged communications.
- Effect is – where documents are leaked or hacked they may still be privileged, but the common law of LPP does not provide a remedy to restrain their use.
- Other causes of action?





## Approach by regulators

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## Tips to protect privilege

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# Protecting privilege

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## Tips to protect privilege

- Keep legal advice confidential – ‘need to know’ basis.
- Never forward the legal advice outside the business (except in exceptional circumstances and if protected by confidential agreement).
- Never paraphrase legal advice in communications – oral or written.
- Clearly Watermark privileged documents as “privileged and confidential”.
- Warning headers on emails.
- Notify lawyers immediately if documents are disclosed inadvertently. It can be fixed if you move quickly and steps are taken to protect your position.
- Avoid referring to privileged communications in other documents

# Protecting privilege

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## Tips to protect privilege

- For the purposes of the board, attach advice if necessary to disclose it and remind directors it is privileged and confidential. Do not include in substance of board papers.
- Pick up the phone, instead of emailing.
- Record the purpose for requesting and passing on legal / expert advice in writing if necessary to circulate it.
- Obtain written instructions from senior management recording the purpose of the request.
- Create more than one report if necessary for internal investigations.
- Consider using external lawyers to commission third party reports.



Questions?

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